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NO. 80-1871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. HOLLY,

Petitioner,

v.

ROBERT E. CHASEN

and

UNITED STATES CUSTOMS SERVICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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The sole question presented by this petition is whether 28 U.S.C. § 1961, which directs that interest "shall be allowed on any money judgment in a civil case recovered in a district court," is applicable to judgments against the United States. The Government states that this question "has long been settled, and it does not warrant review by this Court." Brief in Opposition at 5. To the contrary, the very authorities cited by the Government establish that the question raised here has never before been decided, mak-

ing the issue an appropriate one for review by this Court. Not only would a decision by this Court settle an important question of federal law affecting many litigants, but a reversal of the decision below could significantly improve the operation of the federal courts by discouraging appeals interposed for reasons of delay.

1. The crucial distinction between *pre*-judgment and *post*-judgment interest is not recognized by the Government. The two different types of interest stand on entirely different footings because 28 U.S.C. § 1961 specifically authorizes the assessment of interest after judgment, but says nothing at all about interest prior to judgment. The Government cites several cases for the proposition that, despite the existence of 28 U.S.C. § 1961, pre-judgment and post-judgment interest against the United States are governed by identical principles. However, careful examination of those cases discloses that there is no holding concerning the liability of the United States for interest on judgments. The cases contain, at most, dictum which may be read as supporting the Government's position, but they do not undertake a detailed analysis of the impact of 28 U.S.C. § 1961 on the post-judgment interest question.

In *Anglin & Stevenson v. United States,* 160 F.2d 672 (10th Cir.), *cert. denied,* 331 U.S. 834 (1947), there was no challenge to the Government's claimed immunity from liability for interest. Since the only question raised was whether the judgment involved was in fact one against the United States, 160 F.2d at 672, the Court's cursory discussion of the predecessor of Section 1961 is mere dictum. *United States v. New York Rayon Importing Co.,* 329 U.S. 654 (1947), does not support the Government's position either. That case did not involve an attempt to collect post-judgment interest, but rather a new suit in the Court of Claims based on the Government's withholding of a

payment called for by a previous judgment of the Customs Court because of its uncertainty about the proper person to whom payment was to be made. Since this claim had not yet been reduced to judgment in the Court of Claims, post-judgment interest could not properly have been assessed by that court. In any event, it is clear on the face of Section 1961 that it has no application to judgments of the Customs Court or the Court of Claims, since the section is limited to judgments "recovered in a district court." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41 (1928), is also irrelevant to the question presented here, since in that case it was pre-judgment interest which was being sought. *Richerson v. Jones,* 551 F.2d 918, 925 (3d Cir. 1977), did deny post-judgment interest in a Title VII case involving back pay, but 28 U.S.C. § 1961 is not cited or discussed in the court's opinion.

2. The Government asserts that Section 1961 (which dates back to 1842, with only slight changes in wording) cannot apply to judgments against the United States, since general district court jurisdiction to hear suits against the United States did not exist before the Tucker Act was passed in 1887. Brief in Opposition at 3-4. However, the Government has ignored the unequivocal opinion of Attorney General Cushing, issued in 1855 and cited in the petition (p.7), stating that 5 Stat. 518 (the original predecessor of the present Section 1961) did provide for interest against the United States. *After* the passage of the 1842 interest statute, but *before* passage of the Tucker Act, the Attorney General wrote as follows:

> Congress has already made provision for interest, whether in favor of itself, or of individuals dealing with it, in general acts, where it has seen fit so to do. (See *ex. gr.* i Stat. at Large, p. 677; v Stat. at Large, p. 518.)

7 Op. Atty. Gen. 523, 531 (1855). Thus, while district court actions against the United States were not a frequent occurrence prior to passage of the Tucker Act, *see* Petition for Certiorari at 7; Brief in Opposition at 4 n. 3, such actions were brought on occasion, and those obtaining judgments were entitled to interest.

3. The Government points to the existence of a number of statutes allowing interest against the Government in particular types of cases, and it argues from their existence to the conclusion that Section 1961 was not intended to apply to the United States even when those statutes were admittedly irrelevant. Brief in Opposition at 4. There is no difficulty in harmonizing these statutes "for it is familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States,* 365 U.S. 753, 758 (1961). Accordingly, the specific statutes applicable in tax cases, Tucker Act cases, and Federal Tort Claims Act cases control in those types of cases as to the rate of interest, the period for which interest is available, and any special conditions which must be met. Despite the existence of those provisions, it is Section 1961 which indicates how interest will be computed in the classes of cases not otherwise specifically provided for.

Petitioner's position is not in any way undercut by the tax cases cited by the Government at page 5 of its Brief in Opposition, since those cases merely involved a taxpayer's failure to come within the terms of the particular interest statute applicable in tax cases. *United States ex rel. McLeod v. Sherman,* 98 U.S. 565 (1879); *Huntley v. Southern Oregon Sales, Inc.,* 104 F.2d 153 (9th Cir. 1939); *Reed v. Howbert,* 77 F.2d 227 (10th Cir. 1935). When the predecessor of Section 1961 is mentioned at all in these cases, it is only as dictum or as a repetition of dictum from earlier cases. Despite the broad language sometimes

employed, the principle underlying the holdings of these cases is a narrow one which petitioner does not dispute: in tax cases, Section 1961 is pre-empted by the specific interest statute applicable to such cases. *See* 28 U.S.C. § 2411(a).

4. The statute which is involved here is of potential concern to many litigants who sue the United States or one of its officers or employees in the federal district courts. The interpretation of Section 1961 adopted by the Court of Appeals is contrary to the plain language of the statute, and it is unsupported by the holding of any prior decision. For the foregoing reasons, as well as those stated in the petition for certiorari, this Court should grant the petition and determine whether the Court of Appeals was correct in holding that, contrary to its language, Section 1961 does not apply to judgments against the United States.

Respectfully submitted,

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